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No. 10-196

Supreme Court, U S
FILED
NOV 2 - 2010
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In the Supreme Court of the United States

FRIENDS OF THE EVERGLADES, FLORIDA WILDLIFE FEDERATION, and FISHERMEN AGAINST DESTRUCTION OF THE ENVIRONMENT,

Petitioners,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, CAROL WEHLE, EXECUTIVE DIRECTOR, UNITED STATES, and UNITED STATES SUGAR CORPORATION,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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The petition laid out the many reasons why this Court's review is warranted. The decision below endorsed a construction of the Clean Water Act's central permitting obligation that has been emphatically rejected by other courts and is in plain – and acknowledged – tension with this Court's decision in *South Fla. Water Mgt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2005). The ongoing importance of the issue – and the need for this Court's resolution – are likewise beyond dispute: numerous cases raising the question have been filed throughout the country, including by States, who maintain, in agreement with our petition, that the unitary waters theory is spurious and contrary to law. And consistent with the flood of briefing in *Miccosukee*, the proceedings below saw participation of the United States, which intervened as a party, and of numerous *amici*.

Indeed, as we explained, this case has been widely accepted as *the* vehicle for settling the "unitary waters" question *Miccosukee* reserved, including by the district court on remand in *Miccosukee* itself. The practical consequences of allowing the decision below to stand are far-reaching.

The submissions of the various respondents, to put it mildly, do not refute that showing. The lone party arguing against certiorari, the United States, does not deny the importance of the issue; the "tension" among the appellate decisions; or the fitness of this case for settling the question. The principal defendant and the other intervenor-defendant, who *prevailed below*, go further, affirmatively acquiescing in the grant of certiorari, with the support of an *amicus* contingent that

includes 13 States and other governmental and private entities, all of whom emphasize the need for a definitive resolution by this Court.

Although these parties' substantive arguments are significantly flawed, their submissions underline that the issue is of large national importance; that the lower courts are divided; that the costs of postponing resolution are significant; and that this case is an entirely appropriate vehicle.

In contrast, the government offers only a perfunctory defense of the Eleventh Circuit's decision, and both of its arguments against review, (1) that the circuits that have rejected the unitary waters theory have not yet had the "benefit" of the intervening EPA rule and (2) the "possibility" that EPA might "reconsider" the rule, are insubstantial. Indeed, they are in tension with one another, and the government's chronic caginess on this subject supplies further reason for this Court's review here.

I. In Embracing the Spurious "Unitary Waters" Theory, the Decision Requires This Court's Review

The petition explained that the decision below dramatically erred in pronouncing the "unitary waters" theory a permissible "interpretation" of the CWA, showing it to be manifestly contrary to the text, structure, design, and express purpose of the statute. Many of these defects were first highlighted in the multiple prior appellate decisions rejecting the theory; in this Court's *Miccosukee* opinion; and even in the opinion below. As we further explained, the Eleventh Circuit's deference-triggering conclusions of "ambiguity" and "plausibility" make sense only by

doing what *Chevron* and progeny forbid: abstracting words from the actual statute in which they appear.

While they do not deny that our petition "squarely and concisely present[s]" an "important federal question regarding the proper interpretation of a major federal regulatory program," SFWMD Br 7-8; accord U.S. Sugar Br. at 1, the nonfederal respondents (and *amici*) devote much space to arguing the merits, now insisting, with some vehemence, that the "unitary waters" reading is statutorily compulsory – and that the court below "erred" in concluding otherwise.

The breadth of the gap separating the positions pressed by the principal parties would not, in any case, be a reason for *denying* review. But respondents' assertions are an instance where a page of history is worth a volume of bluster. Despite drumbeat claims of statutory clarity, respondent SFWMD, which was the petitioner in *Miccosukee*, did not in its certiorari petition or principal merits brief allude to the supposedly unambiguous statutory command, which would have been case-dispositive. Instead, it argued in detail the meaning of three components of the definition of "discharge of a pollutant" at 33 U.S.C. 1362(12) – "point source," "addition" and "from" – without engaging the term "navigable waters" or the supposedly conclusive omitted "any" now touted as expressing Congress's clear intent. See Br. for Petitioner, No. 02-262, pp. 24-32.

The SFWMD embraced the unitary waters argument only after the United States submitted its (merits) *amicus* brief. And, despite increasingly strident claims that "unitary waters" has been the

government's "longstanding interpretation," even the *United States* did not hint at the argument at the certiorari stage in *Miccosukee*. Without mentioning the ostensibly decisive definition, the United States opposed review, urging that there was no conflict between the Eleventh Circuit decision (and its First and Second Circuit precursors, see *Catskills Mountains Chapter. of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001); *Dubois v. United States Dept. of Agriculture*, 102 F.3d 1273 (1st Cir. 1996)) and two that had not, *Nat'l Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988); *Nat'l Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), because the former dealt with moving pollutants between "separate bodies of water,'" while the latter had involved returning water "to a water body that was essentially the same as that from which it came." Br. of U.S as Amicus Curiae (certiorari stage), No. 02-262 at 12 (quoting Eleventh Circuit). And this Court, of course, observed that the Government had failed to "identify *any* administrative documents in which EPA ha[d] espoused" the theory. 541 U.S. at 108-109 (emphasis added). See *Georgia* v. *Ashcroft*, 539 U.S. 461, 508 (2003) (Souter, J , dissenting) (discounting arguments that "carr[y] a whiff of the lamp").

Indeed, respondents' arrival at their current, militant "plain language" understanding is, even by the standards of this case, late-breaking. In their briefs opposing *en banc* review below, they expressed scarcely a hint of dissatisfaction with the "deference-based rationale" now decried as "particularly problematic," SFWMD Br. 9. They explicitly urged denial of reconsideration, on the ground that "[t]he

panel properly deferred to the EPA's interpretation," U.S. Sugar En Banc Opp. at 1; accord SFWMD Executive Director Carol Wehle En Banc Opp. 1 (deference appropriate but panel "would not have erred" had it "adopted EPA's construction outright").

2. But the primary problem for respondents' position is not the dogs that do not bark in the night, but those that bay loudly: the enacted text and structure of the Act and the provisions directly at issue specifically foreclose the unitary waters theory.

a. First, as we explained, the very statutory section at issue, by defining "dredged spoil" as a "pollutant," indeed, the first one listed, 33 U.S.C. 1362(6), refutes respondents' claim that Congress intended that permits would be required only where something is "joined to the waters of the United States that *was not already in those waters*," U.S. Sugar Br. 18 (emphasis added).

Rather than attempt an answer to this argument, respondents misunderstand it (or purport to), asserting that "dredged spoil" is relevant to the "separate and independent [Section 404] program," which is "unaffected by excluding water transfers from NPDES." SFWMD Br. 22 (citing 73 Fed. Reg. at 33703); accord US Br. 12 n.5. But this ipse dixit misses the point entirely. The problem is not (only) that EPA's position is *internally* inconsistent or an affront to the rule that "the same [statutory] word, in the same statutory provision," cannot be given "different meanings in different factual contexts," *Santos v. United States*, 128 S. Ct. 2020, 2030 (2008) (plurality opinion). It is that the position is inconsistent with the plainly expressed intent of the Act: the statutory definition the unitary waters

theory purports to "interpret" is not found in provisions peculiar to the Section 402 program; it appears in the definition of the "discharge of a pollutant," and thus governs the scope of the general Section 301(a) prohibition, which is the predicate for permitting under both Sections 402 and 404. See 33 U.S.C. 1311(a), 1362(12).

b. Respondents likewise sidestep the significance of the fact that the statute's Water Quality Standards, which NPDES permits implement, are focused on distinct bodies of water, see Pet. 17, 24-25, not the waters of the United States as a whole – treating this as if it were just another "policy" argument, *i.e.*, that a "distinct waters" interpretation merely will better serve the Act's overarching pollution-reduction purposes than a unitary waters "reading." But the defect identified is not one of relative potency. It is that the latter makes no sense in light of the statute's design and operation. Nothing in the Act hints at legislative concern about "increase[s] in the pollutants in 'navigable waters'" U.S. Sugar Br. 18, as an undifferentiated whole. Rather, the statute's design makes clear that "Congress wrote the CWA for a singular 'Nation' with many, plural, 'waters.'" Heidi Hande, Note, Is EPA's Unitary Waters Theory All Wet?, 6 Wyo. L. Rev. 401, 432 (2006) (quoting 33 U.S.C. 1251(a)).

Thus, while the decision below correctly highlighted that the Act uses "navigable waters" in more than one way, sometimes to mean a single waterbody and sometimes as a plural, referring to all bodies subject to federal regulation, it nowhere uses that term in the "unitary" sense: *i.e.*, to treat the waters as a single indivisible whole. Cf. *Rapanos v. United States*, 547 U.S. 715, 732 (2006) ("The use of

the definite article ('the') and the plural number ('waters') shows plainly that § 1362(7) does not refer to water in general.") (plurality opinion).

This is especially apparent where the Section 402 permitting program is concerned: what a permit requires depends critically on the water quality standards applicable to the particular body into which the point source will release pollutants. Indeed, the *Miccosukee* opinion made this very point, 541 U.S. at 107.[1]

Unsurprisingly, the effort to show that the unitary waters theory is in fact "compelled" by the "plain meaning" of the statute fares even worse than to show it is "reasonable." Indeed, although respondents and *amici*, in condemning the Eleventh Circuit's deference rationale, claim the mantle of textualism, their briefs are clad only scantily with statutory language, appealing largely to policy considerations and broad principles of federalism. Of course, water pollution in navigable waters is a

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[1] While *Miccosukee* did not by its own force preclude EPA or the lower courts from adopting the unitary waters theory, see 541 U S at 109, Judge Carnes's characterization of the decision as "call[ing] a strike or two" against the theory rings more true than respondents' assertion that the Court "mentioned a few arguments for and against" it U S. Sugar Br. 9. The opinion identified a solitary favorable (policy) argument, then highlighted a series of textual and regulatory signals "contrary to the unitary waters approach," 541 U.S at 107. Neither the EPA rulemaking nor the decision below – nor respondents – has made any serious effort to answer these

matter of longstanding and appropriate federal concern. Cf. *United States v. Locke*, 529 U.S. 89, 108 (2000) (presumption against preemption is "not triggered" in areas "where there has been a history of significant federal presence"). State and municipal polluters are not exempt from CWA obligations, and Section 402 is itself federalism-respecting: State authorities issue permits and state rules are incorporated into permits. In *Miccosukee*, more States supported plaintiffs than supported the District, see, Br. of New York [and 12 other states], No. 02-262; Br. of Pennsylvania Dept. Env. Protection; see also Br. of Assoc. of State Wetland Mgrs., *et al.*; and multiple states have challenged EPA's recent rule. See 11th Cir. No. 08-16283-C (New York, Connecticut, Delaware, Illinois, Maine, Minnesota, Missouri, Washington, and the Province of Manitoba).

Indeed, a central thrust of their submission was recognized in *Miccosukee*, 541 U.S. at 108: Both the CWA's provision of authority for "general permits" and long experience under a permitting regime (Pennsylvania's) like the one plaintiffs sought belied claims of administrative infeasibility and expense; the alleged tens of thousands of new permits could be avoided by use of general permits that encompass entire water control and conveyance systems - such as California's massive Central Valley Project - in a single general permit. See also 40 C.F.R. 122.28 (2008).

II. This Court's Resolution Should Not Be Further Postponed

The importance of this case is self-evident. As the Eleventh Circuit opinion recognized, its decision upheld a highly consequential interpretation that

had been rejected by every other circuit court to have considered it, one this Court had highlighted as suspect on multiple grounds. See Pet. App. 13a (citing *Miccosukee*, 541 U.S. at 106-109).

Nor is there any dispute that this case is an especially fit vehicle for addressing the question. It arises from circumstances closely related to those in *Miccosukee* itself. But unlike in that case, the judgment here was rendered after a lengthy trial and supported by detailed and comprehensive factual findings. And the district court on remand in *Miccosukee* stayed consideration of the issue pending decision here, as have federal courts elsewhere. Pet. 9-10 n.4.

The government nonetheless suggests that review be further postponed because the decisions rejecting the unitary waters theory were reached without the "benefit of" the EPA's 2008 rule (and did not address the issue through the "lens of *Chevron*"). See U.S. Opp. at 19-20; see also *id.* (citing *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)).

This parsing of those decisions is debatable: they condemned in harsh terms the reasoning advanced here. See *Dubois*, 102 F.3d at 1296 ("[t]here is no basis in law or fact" for theory); *Catskills Mountains Ch. of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 84 (2d Cir. 2006) (then- proposed EPA rule "simply overlook[ed] [the CWA's] plain language"). But this is beside the point: were these courts to read their prior decisions as having merely announced the "best" interpretation, there is every reason to expect they would now – correctly – decide that it is the only permissible one. Indeed, while the fact of an EPA regulation (albeit one whose vitality

the government does not vouch for, see *infra*) is legally relevant, there is, as we explained, remarkably little substantive analysis in the EPA's rulemaking that might sway a court (EPA never mentioned the textual feature, the "missing 'any,'" that was the linchpin of the Eleventh Circuit's reading). See Pet. 18 & n.5, 23-24.

And given the (current) position of the respective parties, it is a certainty that *any* future decision from those jurisdictions – whether one (1) interpreting circuit precedent as binding under *Brand X*; (2) rejecting the "unitary waters" theory as impermissible on *de novo* consideration; or (3) dramatically reversing course and agreeing with the Eleventh Circuit – will itself prompt petitions for certiorari, supported with submissions like those here. Given the exhaustive briefing it has already received, new First or Second Circuit decisions either way would not significantly advance the Court's understanding of this purely legal issue.

The costs of withholding review, in contrast, are serious. First, the Eleventh Circuit did not deny the necessary consequences of its rule. See Pet. App. 4a, 33a (noting that canals in question include a "loathsome concoction of chemical contaminants" and that legal theory adopted allows such pollutants to be discharged into "pristine" water bodies). As the Court recognized, 541 U.S. at 101-102, the activities at issue in that case are very significant to the Everglades ecosystem; and because Lake Okeechobee is a drinking water source, Pet. App. 89a n.29, this case involves significant public health concerns. Pet. App. 45a-46a (reciting expert's testimony that "the backpumping at issue creates a significant risk of triggering a toxic algal bloom that

could cause serious injury to humans and death to wildlife" and observing that "[d]efendants do not seriously challenge these assertions").

3. The government's invocation (Br. 20-21) of the "possibility" that EPA might yet reconsider and rescind the regulation relied on below is not "an additional reason for this Court to deny review." A "possibility" that a regulation may be replaced or withdrawn does not distinguish this case from every other regulatory case.

And while the government underscores (Br. 20) that it told the Eleventh Circuit (albeit only in the context of a plea to refuse further review) that EPA's rule would be "reconsidered" – it offered no further elaboration then, and no further information has been forthcoming in the more than a year since. Here the government offers a bare citation to that Eleventh Circuit submission, along with an assertion that a "change," if any, "presumably" would benefit petitioners – without further inkling about the scope, nature, timing, or basis for its reconsideration "process."

Finally, although we disagree with the premise of respondents' *amici* that there is anything remotely improper about the Executive Branch's changing positions to align with the policy views of the administration in office, see *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), the government's course of conduct here – repeatedly announcing changes of position (or "possible" ones) that have the effect of upending the ordinary process of judicial resolution – argues in favor of review, not against it.

As noted, the government's "unitary waters" theory debuted in its merits-stage *amicus* brief in *Miccosukee* (despite government participation at the petition stage). And after launching the theory, inducing the Court to take the quite unusual step of entertaining an alternative ground *for reversal* not offered below, but see 541 U.S. at 112-13 (Scalia, J., concurring in part and dissenting in part), the government did not promulgate a regulation ostensibly codifying its position until four years later, *after* the district court here had rejected the position on the merits, and indeed after appellate briefing was complete. The prospect of further Eleventh Circuit review led the government to raise the possibility of "reconsideration," which has been publicly dormant since – until review by this Court became a prospect.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 2010